(13)

No. 01-1491

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

In The
Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The question in this case is whether the government can subject lawful permanent residents of the United States to an indeterminate and often prolonged period of mandatory detention without any individualized determination that such detention furthers the government's interest in protecting against danger and flight risk. As construed by the government, 8 U.S.C. 1226(c) compels the detention throughout the administrative removal process of any immigrants, including longtime lawful permanent residents, who are charged with being deportable based on a wide range of criminal convictions. The statute applies to immigrants like the respondent, who were convicted of minor nonviolent offenses, who are raising bona fide challenges to removal, and whom the Immigration and Naturalization Service ("INS") itself concedes pose no danger or risk of flight warranting detention.[1]

Respondent does not challenge the government's authority to use detention to ensure the appearance of immigrants at their hearings (and for removal if ultimately ordered) or to protect the public from danger in cases where an alien actually poses a threat or flight risk. Detention under Section 1226(c), however, does not depend on any such finding. The statute prohibits any inquiry into whether detention is actually needed to achieve these ends. Respondent challenges both the application of Section 1226(c) to his case, as an immigrant who is not subject to a final administrative removal order, and its constitutionality as applied to lawful permanent residents.

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[1] The government's restated "Question Presented" – that "respondent *concedes* that his criminal convictions . . . put him within the class of removable aliens who are subject to detention" (emphasis added) – does not accurately describe the current facts of the case as set forth more fully at pp. 11-12, *infra*.

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, amended the INA, 8 U.S.C. 1101 *et seq.*, by, *inter alia*, adding the provision at issue here, 8 U.S.C. 1226(c). The new provision requires the Attorney General to take into custody any alien who "is deportable" based on a criminal conviction specified in the statute, 8 U.S.C. 1226(c)(1)(B)-(C), and prohibits the release of any such alien except in limited circumstances involving witness protection, 8 U.S.C. 1226(c)(2). The convictions that trigger Section 1226(c) include any "aggravated felony," 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(iii); any two "crimes involving moral turpitude" committed at any time and regardless of the sentence imposed, 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii); and any single "crime involving moral turpitude" if committed within five years of the alien's admission into the United States, where the sentence was a term of imprisonment of at least one year, 8 U.S.C. 1226(c)(1)(C), 1227(a)(2)(A)(i).[2]

Many nonviolent and misdemeanor offenses trigger the detention mandate of Section 1226(c). Under the INA, the term "aggravated felony" may include such crimes as shoplifting, petit larceny, attempted possession of stolen property, and perjury, even if classified as misdemeanors

[2] Two other subsections of Section 1226(c) mandate detention of aliens who are "inadmissible" based on enumerated criminal convictions, 8 U.S.C. 1226(c)(1)(A), or who are charged with "terrorist activities" under the INA, 8 U.S.C. 1226(c)(1)(D). Both of those categories raise distinct constitutional considerations not at issue here. *See Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (noting that Court's constitutional analysis of detention challenge does not necessarily apply to aliens who have not effectuated an entry or to the special considerations that arise in cases involving terrorism).

by the convicting jurisdiction.[3] A "crime involving moral turpitude" may include offenses such as issuance of a bad check, possession of stolen property, making a false statement, and petit theft.[4]

Section 1226(c) applies even though the triggering conviction may later be determined not to constitute an "aggravated felony" or a "crime involving moral turpitude" and thus not a ground of removal at all. Section 1226(c) also imposes detention on many aliens who remain eligible for various forms of relief – both mandatory and discretionary – under the immigration laws and who ultimately prevail in their proceedings. That is especially true for lawful permanent residents like the respondent here.[5] *See*

[3] *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor shoplifting arising out of theft of four packs of cigarettes and two packs of cold medicine valued at $83.50), *cert. denied*, 533 U.S. 904 (2001); *United States v. Graham*, 169 F.3d 787 (3d Cir.) (state misdemeanor petit larceny with maximum one year prison term), *cert. denied*, 528 U.S. 845 (1999); *United States v. Christopher*, 239 F.3d 1191 (11th Cir.) (state misdemeanor theft by shoplifting), *cert. denied*, 122 S. Ct. 178 (2001); *In re Martin*, 23 I. & N. Dec. 491 (BIA 2002) (third degree misdemeanor assault); *In re Martinez-Recinos*, 23 I. & N. Dec. 175 (BIA 2001) (perjury); *In re Bahta*, 22 I. & N. Dec. 1381 (BIA 2000) (attempted possession of stolen property).

[4] *See, e.g., Michel v. INS*, 206 F.3d 253, 261 (2d Cir. 2000) (possession of stolen property in the fifth degree, involving possession of stolen bus transfers); *In re Alarcon*, 20 I. & N. Dec. 557, 559 (BIA 1992) (petit theft); *In re Bart*, 20 I. & N. Dec. 436 (BIA 1992) (issuance of a bad check).

[5] Lawful permanent residents subject to removal based on a criminal conviction enumerated in Section 1226(c) may be eligible for relief under former 8 U.S.C. 1182(c) (1994) (repealed 1996) (*see INS v. St. Cyr*, 533 U.S. 289 (2001)); for "cancellation of removal" under 8 U.S.C. 1229b or asylum under 8 U.S.C. 1158 if the conviction does not constitute an aggravated felony; for mandatory "withholding of removal" under 8 U.S.C. 1231(b)(3) if the conviction does not constitute a "particularly serious crime;" or mandatory protection against removal under the Convention Against Torture ("CAT") regardless of the nature

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Brief Amici Curiae of Citizens and Immigrants for Equal Justice *et al.* ("CIEJ Amici") (enumerating many cases of immigrants detained under Section 1226(c) who subsequently prevailed in their removal proceedings).

Section 1226(c) contains no time limit on the detention it requires and often results in lengthy periods of incarceration. The Attorney General applies the detention mandate of Section 1226(c) throughout administrative removal proceedings, a multi-stage process. The initial stage of a removal hearing, which is conducted before an immigration judge ("IJ"), can take from several months to well over a year. An IJ must determine whether an alien falls within a statutory ground of deportation (as well as any claim that an alien may have acquired United States citizenship through a parent or through naturalization). If the grounds of deportation are established or conceded, the IJ must consider eligibility for relief and adjudicate any claim for which the alien is eligible.

Either the alien or the INS may appeal an IJ's order to the Board of Immigration Appeals ("BIA"), which may affirm or reverse the IJ's rulings or remand for further proceedings. *See* 8 U.S.C. 1229a(c). Appeals to the BIA rarely take less than four months and often take more than a year. The administrative process ends when the BIA issues a final decision (or the time for appeal of an IJ's order expires). In the case of lawful permanent residents, their legal status terminates only when the administrative process is over. *See* 8 C.F.R. 1.1(p); *In re Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).

Given the time required for hearings and appeals, individuals whose cases are appealed to the BIA can expect to be incarcerated between six months and well

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of the conviction, 8 C.F.R. 208.17(a). Asylum, withholding, and CAT protection are also available to aliens who are not lawful permanent residents.

over a year.[6] The government offers statistical data purporting to reflect the average period of detention for aliens subjected to Section 1226(c). *See* Pet. Br. at 39-40. This data understates the length of detention for lawful permanent residents and other aliens who challenge their removal. Removal proceedings for lawful permanent residents are likely to be the most protracted because they have the most substantial legal claims and the most at stake.

Section 1226(c) deviates from the individualized release procedures provided to other aliens in removal proceedings. In cases not governed by Section 1226(c), the INS routinely makes individualized bond determinations based on an assessment of danger to the public and flight risk (*i.e.*, whether bond will ensure an alien's appearance in light of an individual's ties to the community and eligibility for relief from removal). Immigration judges regularly review these determinations at brief, informal bond redetermination hearings. *See* 8 C.F.R. 3.19(a), 236.1(d)(1). In cases where an IJ releases on bond an individual whom the INS would not have released, the INS may appeal the bond decision to the BIA (and ultimately the Attorney General) and obtain an automatic stay of the release decision pending that appeal. *See* 8 C.F.R. 3.19(i), (f). For individuals subject to Section 1226(c), however, the statute prohibits any inquiry into flight risk or danger. An individual who is detained

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[6] *See, e.g., Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002) (lawful permanent resident mandatorily detained 14 months before district court ordered bond hearing); *Abimbola v. Ashcroft*, No. 01-CV-5568, 2002 WL 2003186, *1 (E.D.N.Y. Aug. 28, 2002) (lawful permanent resident mandatorily detained 20 months before BIA order); *Amaye v. Elwood*, No. CV-01-2177, 2002 WL 1747540, *2 (M.D. Pa. June 17, 2002) (conditional resident mandatorily detained more than 16 months, half of this time during INS appeal of favorable ruling); *Williams v. INS*, No. 01-043, 2001 WL 1136099, *1 (D.R.I. Aug. 7, 2001) (BIA appeal pending 20 months while individual mandatorily detained). *See generally* CIEJ Amici (citing additional cases).

pursuant to Section 1226(c) may assert only that he is not properly subject to the statute. 8 C.F.R. 3.19(h)(2); *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

2. In the years preceding Congress' enactment of Section 1226(c), little attention was focused on the issue of individualized bond determinations and whether they were accurate in identifying immigrants with criminal convictions who were likely to pose a danger or flight risk. Instead, the studies and hearings that were conducted during this period focused on two principal concerns: (1) the INS's lack of a reliable system for identifying immigrants with criminal convictions while they were still in the criminal justice system, and (2) the INS's lack of sufficient detention space to detain those offenders it was able to identify. Studies showed that, in the case of most immigrants with criminal convictions, the INS did not initiate deportation proceedings while they were still serving their criminal sentences, did not take them into immigration custody when their criminal incarceration ended, and never made a determination as to whether release or detention was appropriate.[7] The studies also showed that, of those taken into custody, many were released because the INS lacked detention space, *not* because the INS determined that they posed no danger or flight risk.[8]

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[7] *See, e.g.*, GAO, No. GAO/GGD-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 41 (1992) ("GAO 1992") (noting that due to limited detention space, INS "did not detain all criminal aliens"); Immigration and Naturalization Service, *Immigration Act of 1990 Report on Criminal Aliens* 7 (1992) (noting INS failure to "identify [criminal aliens] and determine deportability during their period of incarceration" as significant factor inhibiting deportation of criminal aliens); U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 157-60 (1994) (recommending increased resources to identify criminal aliens and conduct deportation proceedings before completion of their criminal sentences).

[8] *See, e.g.*, H.R. Rep. No. 104-469, pt. 1 at 124 (1996) ("INS is sometimes reluctant to set bonds too high because if the alien is not

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Beginning in 1988 and continuing with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and IIRIRA, Congress enacted measures to facilitate removal of aliens convicted of criminal offenses. Among these measures, Congress directed the INS to identify and track noncitizens with criminal convictions while they were still in the criminal justice system and to establish the Institutional Hearing Program ("IHP") to initiate and complete deportation proceedings during the aliens' criminal incarceration. *See* AEDPA, Pub. L. No. 104-132, Sections 432, 438(a), 110 Stat. 1214, 1273-76 (codified as amended at former 8 U.S.C. 1252); IIRIRA Sections 326, 329 (codified at 8 U.S.C. 1228). Congress also allocated additional funds to expand INS detention capacity. *See* IIRIRA Sections 386-87. As a result, the INS's detention capacity increased from approximately 6,200 beds in 1992 to more than 21,000 beds in 2001.[9] During this same period, the INS also contracted with the Vera Institute of Justice to investigate the efficacy of supervised release as a means of ensuring appearance at

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able to pay, the alien cannot be released, and a needed bed space is lost. In essence, in deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources."); *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 103d Cong. 21 (1993) ("1993 Senate Hearing") ("The lack of INS detention space in many of its districts puts pressure on the INS to release, rather than detain, criminal aliens."); Congressional Task Force on Immigration Reform, *Report to the Speaker* 44-45 (1995) ("1995 Task Force Report") (noting that INS "does not have adequate resources for holding facilities" and recommending "that Congress appropriate sufficient funds to expand INS detention facilities to at least 9,000 beds").

[9] *See* GAO 1992, *supra* n.7, at 12 (estimating INS capacity to detain 6,259 individuals in 1992); *A Review of Dep't of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 22 (2001) (Statement of Joseph Greene) (INS had access to 21,304 beds to detain individuals in 2001).

immigration proceedings and more efficient use of INS's limited detention space. The Vera study found that with screening and supervised release, 92-94% of lawful permanent residents with criminal convictions appeared for their hearings.[10]

3. Respondent Hyung Joon Kim is a lawful permanent resident of the United States who has lived in this country since the age of six. Pet. App. 2a, 31a-32a. His mother is a United States citizen and his father and brother are lawful permanent residents. In 1996, Mr. Kim was convicted of first degree burglary of a toolshed, for which he received a sentence of five years' probation and 180 days in jail (of which 117 were suspended). Pet. App. 2a, 32a. In 1997, he was convicted of "petty theft with priors" and sentenced to three years' imprisonment. He was released after serving less than two years. Pet. App. 2a, 32a.[11]

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[10] *See* Vera Institute of Justice, 1 *Testing Community Supervision for the INS* 36 (2000) ("Vera Study"), *available at* http://www.vera.org/publication_pdf/aapfinal.pdf. More recently, the INS has also implemented other measures to address the problem of immigrants (criminal and noncriminal) who fail to report for removal. *See, e.g.*, 67 Fed. Reg. 31,157 (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, 241) (imposing new penalties on aliens who fail to comply with surrender orders); 66 Fed. Reg. 54,909 (Oct. 31, 2001) (codified at 8 C.F.R. 3.19(i)(2)) (authorizing INS to automatically stay any release decision by an immigration judge releasing an alien whom INS does not want released). A recently released audit by the Office of Inspector General criticized the INS for its continuing failure to identify and deport immigrants with criminal convictions while they are serving their criminal sentences, thereby causing a need for additional detention space when these individuals are released from prison. *See* Office of the Inspector General, U.S. Dep't of Justice, Rep. No. 02-41, *Audit Report: Immigration and Naturalization Service Institutional Removal Program* (2002).

[11] The government erroneously states that Mr. Kim received "a suspended sentence of five years' imprisonment" for his 1996 conviction. *Compare* Pet. Br. at 3, *with* Sentence, No. SC961052 (Cal. Super. Ct. Aug. 1, 1996) (showing that *imposition* of sentence was suspended). That error is significant because a five year term of imprisonment could affect Mr. Kim's eligibility for some forms of relief under the INA.

(Continued on following page)

The INS did not commence removal proceedings against Mr. Kim while he was serving his criminal sentence. Instead, on February 2, 1999, the day after he was released from incarceration, the INS arrested and detained him at a county jail. Pet. App. 2a, 32a. Pursuant to Section 1226(c), the INS refused to consider his release on bond. C.A. E.R. 3.

The INS charged Mr. Kim with being deportable on the ground that his 1997 petty theft conviction constituted an aggravated felony. C.A. E.R. 5. The INS did not formally commence removal proceedings against Mr. Kim until five weeks after his arrest and detention. *See* C.A. E.R. 5 (charging document filed March 10, 1999); 8 C.F.R. 3.14 (proceedings do not commence until charging document filed with immigration court).

In May 1999, after more than three months in INS detention, and while still awaiting his first substantive IJ hearing,[12] Mr. Kim brought a habeas corpus petition challenging the constitutionality of his mandatory detention under Section 1226(c). Pet. App. 2a, 33a. In August 1999, the district court held Section 1226(c) unconstitutional and ordered the government to provide Mr. Kim with an individualized bond determination. Pet. App. 31a-51a. The Attorney General did not seek a stay of the district court's order nor oppose Mr. Kim's release on bond. Instead, five days after the district court decision, and more than six months after Mr. Kim was taken into INS

Subsequent to his 1997 offense, Mr. Kim was sentenced to a two-year prison term for the 1996 conviction, to be served concurrently with the three-year term he received for the 1997 conviction. C.A. E.R. 6.

[12] On April 9, 1999, two months after his arrest and detention by the INS, Mr. Kim received a "master calendar" hearing. At that hearing, the IJ scheduled a further hearing for July 8, three months hence, to consider Mr. Kim's application for withholding of removal. The July hearing was later continued to September 13 to allow Mr. Kim time to obtain documents relevant to his withholding application, which is based on his fear of persecution on account of his religion.

custody, the INS made its own determination that he presented neither a "threat" nor a significant "flight risk" and authorized his release on a $5,000 bond. J.A. at 13.

4. The court of appeals addressed the constitutionality of Section 1226(c) only "as applied to Kim in his status as a lawful permanent resident alien." Pet. App. 30a. The court rejected the government's argument that Congress' plenary authority over immigration dictated a deferential standard of review, finding that as in *Zadvydas v. Davis*, 533 U.S. 678 (2001), detention constitutes a "means" of carrying out Congress' substantive immigration policies. Pet. App. 9a-10a. The court held that the government's interest in using detention as a means for ensuring removal and protecting the public from danger did not permit the complete elimination of any individualized release determination based on flight risk and danger. Pet. App. 13a-21a. The court stressed that Section 1226(c)'s lack of any "provision for an individualized determination of dangerousness" contrasted sharply with the civil detention upheld in *United States v. Salerno*, 481 U.S. 739 (1987), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Carlson v. Landon*, 342 U.S. 524 (1952), all of which involved individualized detention determinations. Pet. App. 17a-19a.

The Court also noted that the government's rationale for requiring mandatory detention of aliens with criminal convictions during the pendency of removal proceedings was substantially undermined by the fact that the same category of aliens is statutorily *eligible* for release from detention *after* a final order of removal issues. Pet. App. 22a-23a (citing Section 1231(a)(6)). The court of appeals further concluded that Section 1226(c) could not even satisfy the due process standard enunciated in Justice Kennedy's *Zadvydas* dissent because the statute imposes "arbitrary and capricious" detention by eliminating *any* procedure for determining an individual's danger or flight risk. Pet. App. 25a-26a.

The court of appeals ruled on constitutional grounds, rejecting respondent's argument that Section 1226(c) does

not apply to Mr. Kim. Pet. App. 27a-29a. The court recognized that the language of Section 1226(c) is ambiguous, Pet. App. 28a, but declined to adopt respondent's interpretation because it believed that the proposed construction was inconsistent with other language in the statute. Pet. App. 29a.

In addition to the Ninth Circuit, three other courts of appeals have held that, in light of *Zadvydas*, Section 1226(c) violates due process as applied to the lawful permanent resident petitioners in those cases. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002), *pet. for cert. pending*, No. 01-1616. *But cf. Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999) (decided pre-*Zadvydas* and concerning alien who raised no challenge to removal).

5. On June 6, 2002, after respondent filed his Brief in Opposition with this Court, the Ninth Circuit held that a conviction for "petty theft with priors" under the same California statute under which Mr. Kim was convicted in 1997 does not "qualify as an aggravated felony [under the INA]." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1213 (9th Cir. 2002). On the basis of that ruling, Mr. Kim intends to argue at his next hearing that he is not deportable as an aggravated felon as alleged in his INS charging document.

Ten weeks after the *Corona-Sanchez* ruling (and after the Court's grant of plenary review in this case), the INS amended the immigration charges against Mr. Kim to include his 1996 conviction and to add a new ground of deportation. Pet. Br. at 3 n.2. The additional ground alleges that Mr. Kim's 1996 and 1997 convictions constitute "crimes involving moral turpitude" and that he is now subject to deportation on this basis (which is also a basis for mandatory detention under Section 1226(c)).

At his next scheduled IJ hearing, Mr. Kim will assert that his convictions do not render him deportable because his 1997 conviction does not constitute an aggravated felony under the Ninth Circuit's decision, and his 1996

conviction does not constitute either an aggravated felony or a crime involving moral turpitude. Mr. Kim will further assert that, even if his 1996 conviction were found to be a ground of deportation, he remains eligible for a discretionary waiver of removal under former Section 1182(c) because the offense occurred before IIRIRA's enactment, *see INS v. St. Cyr,* 533 U.S. 289, 294-95, 326 (2001); for mandatory withholding of removal under 8 U.S.C. 1231; and for a discretionary grant of cancellation of removal under 8 U.S.C. 1229(b) (which is available to non-aggravated felons).

SUMMARY OF ARGUMENT

The Court has repeatedly emphasized that freedom from government detention lies at the core of the liberty that the Due Process Clause protects. This principle applies with full force to immigration detention. *Zadvydas v. Davis,* 533 U.S. 678 (2001). Section 1226(c) violates due process as applied to lawful permanent residents because it prohibits any individualized determination that the purposes of detention are being served. As construed by the Attorney General, the statute imposes indeterminate, often prolonged, mandatory detention based solely on an individual's past criminal conviction. Mandatory detention applies even to lawful permanent residents convicted of minor nonviolent offenses, who are contesting their removal and who are not subject to a final administrative order of removal.

1. A. Section 1226(c) is unlike any immigration or non-immigration detention statute that the Court has ever upheld because it imposes categorical detention while prohibiting any individualized determination that detention is actually necessary to serve the government's interests. The Due Process Clause requires, at a minimum, an individualized determination that the purposes of detention are being served. Thus, the hallmark of the Court's civil detention decisions is the presence of individual decisionmaking. *United States v. Salerno,* 481 U.S. 739 (1987); *Foucha v. Louisiana,* 504 U.S. 71 (1992).

The Court's immigration detention decisions, *Carlson v. Landon*, 342 U.S. 524 (1952), *Reno v. Flores*, 507 U.S. 292 (1993), and most recently *Zadvydas*, reflect the same concern for individualized detention determinations. Despite the government's assertions to the contrary, both *Carlson* and *Flores* upheld the *discretionary* detention authority of the Attorney General, not a mandatory detention statute like Section 1226(c). Moreover, as the Court recognized in *Zadvydas*, while Congress possesses plenary power to set substantive immigration policy, detention is a means for implementing that policy and must comport with due process.

B. Section 1226(c)'s prohibition of any individualized detention determination is particularly stark because it results in prolonged detention of a wide array of lawful permanent residents who pose no danger or flight risk, who are raising bona fide challenges to removal, and who often prevail in those challenges. The government's claim that Section 1226(c) is limited in duration and applies only to a subset of criminal aliens whose removal is inevitable is belied by the scope of the statute, the government's own statistics showing an "average" of six months detention for individuals whose cases are appealed to the BIA, and numerous examples of individuals who were mandatorily detained for long periods of time and subsequently prevailed in their challenges to removal. The fact that the Attorney General allows immigrants to assert that they are *not* encompassed by Section 1226(c) – an inquiry that does not consider flight risk or danger or even an individual's eligibility for relief from removal – does nothing to diminish the statute's constitutional infirmity for those who are covered by the statute.

C. The mandatory detention imposed by Section 1226(c) is wholly unjustified by the government's interests in removing criminal aliens and protecting the public during that process. The voluminous legislative history and studies relied upon by the government are not to the contrary. The government's own statistics show that 80% of criminal aliens appear for their removal proceedings.

The government's other figures are of little relevance because they are based on studies that were conducted during a period of time when INS release decisions were driven more by space constraints than by individualized determinations of danger and flight risk, and thus do not demonstrate that such determinations are ineffective. Nor would individualized release determinations impose any significant burden or delay, as the Attorney General routinely makes such determinations in removal cases not subject to the restrictions of Section 1226(c). Moreover, individuals detained under Section 1226(c) are already entitled to a hearing at which they can challenge the INS's determination that they are properly subject to the statute. Consideration of danger and flight risk could easily be incorporated into this existing procedure.

2. The Court need not reach the profound constitutional issues raised in this case because, properly construed, Section 1226(c) does not apply to respondent. Section 1226(c) requires mandatory detention only when an alien "is deportable" based on one of the enumerated grounds in the statute – language that is distinct from prior mandatory detention statutes where Congress required detention of any alien "convicted" of the designated offenses. An alien is not "deportable" until a final administrative order of removal issues at the conclusion of removal proceedings. Because no such order has issued in respondent's case, he is not subject to mandatory detention under the statute.

ARGUMENT

I. SECTION 1226(c) VIOLATES THE DUE PROCESS CLAUSE AS APPLIED TO LAWFUL PERMANENT RESIDENTS LIKE RESPONDENT

Less than two years ago, in a case involving immigration detention, the Court reaffirmed that "[f]reedom from

imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause [of the Fifth Amendment] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted). *See also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (citations omitted); *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception."). "[I]ncarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference[ ] . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution." *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting).

Because of the significant liberty interest involved, the Court has upheld civil detention only "in certain special and 'narrow' non-punitive 'circumstances,'" where the government's interest "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80, and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Although the Court has articulated varying formulations for this test, *see, e.g., Salerno*, 481 U.S. at 747 (detention cannot be "excessive in relation to the regulatory goal Congress sought to achieve"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (the nature and duration of detention must bear a "reasonable relation" to the purposes for which the individual is detained), at a minimum, due process requires an individualized determination that the purposes of detention are actually being served. Section 1226(c) fails this minimum requirement.

A. Section 1226(c) Violates Due Process Because It Prohibits Any Individualized Determination Of Danger Or Flight Risk

Section 1226(c) violates the Due Process Clause because it requires mandatory, across-the-board detention based solely on an individual's past criminal conviction and prohibits any assessment of an individual's actual dangerousness or flight risk. The Court has never upheld – nor has the government previously sought to defend – a statute that imposes a blanket requirement of detention, while prohibiting *any* individualized determination that such detention is necessary. As illustrated most recently by *Zadvydas*, the Court has consistently applied the same due process principles to all civil detention statutes. *See* 533 U.S. at 690-92 (applying due process standards from civil commitment and pre-trial detention cases to immigration detention statute).

1. The bare minimum that due process requires of any detention scheme is an individualized showing that detention of a particular person is warranted in light of the government's purpose for the detention. That minimum requirement is reflected in all of the Court's civil detention decisions.

The pre-trial detention context is especially relevant to this case because it concerns the authority to detain individuals during the pendency of a proceeding to determine whether an allegation or charge will be sustained. Where pre-trial detention is at issue, the Court has recognized the importance of an individualized hearing to determine if detention is necessary to ensure appearance at trial or to protect the public from danger. In *Salerno*, for example, the Court emphasized that the statute required the government to demonstrate in a "full-blown adversary hearing" before a judicial officer by "clear and convincing evidence" that "no conditions of [pre-trial] release [could] reasonably assure the safety of the community or any person." 481 U.S. at 750. The judge, moreover, was required to consider the individual's specific circumstances, such as "the nature and seriousness of the charges, the

substantiality of the Government's evidence . . . , the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release." *Id.* at 742-43. Only in light of such a prompt and individualized determination of danger did the Court conclude that pre-trial detention was not "excessive in relation to the regulatory goal Congress sought to achieve." *Id.* at 747.[13]

In *Schall v. Martin*, the Court applied the same "excessive" standard to pre-trial detention of juveniles. 467 U.S. 253, 269 (1984). It specifically noted that an individual judicial hearing was required at which a judge could consider "the nature and seriousness of the charges; . . . the juvenile's prior record; the adequacy and effectiveness of his home supervision; . . . and any special circumstances" raised by "the probation officer, the child's attorney, or any parents, relatives, or other responsible persons accompanying the child." 467 U.S. at 279. *Schall* stressed the critical importance of these elements even though the Court found that the liberty interest of juveniles was more qualified than that of adults, *id.* at 265, and even though the maximum permissible length of detention was only seventeen days, *id.* at 270.

The Court's civil commitment cases exhibit the same imperative for an individualized determination of whether the purposes of commitment are served in a particular case. For example, *Jackson* invalidated a statute allowing indefinite commitment of defendants who were incompetent to stand trial, because the statute did not require an assessment of whether the commitment would serve the purpose of the detention, *i.e.*, aiding a defendant to become competent. 406 U.S. at 737-38. The Court emphasized that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable

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[13] *See also* Brief for the United States at 14, 38-39, *Salerno* (No. 86-87) (stressing, *inter alia*, the existence of "an individualized judgment of dangerousness," as supporting constitutionality of statute).

relation to the purpose for which the individual is committed." *Id.* at 738.

Even where an individualized determination is provided, due process requires that the determination be one that sufficiently protects against the erroneous or arbitrary detention of individuals for whom detention would not serve the government's purpose. Thus, *Addington v. Texas* struck down a statute allowing for civil commitment of mentally ill individuals based on "a mere preponderance of the evidence" standard. 441 U.S. 418, 427 (1979). Although the statute provided for individualized determinations, the standard was insufficiently protective in light of the "weight and gravity" of the individual's liberty interest. *Id.* at 427. The Court explained that "the State ha[d] no interest in confining individuals involuntarily if they [were] not mentally ill or if they [did] not pose some danger," and that the unduly lenient preponderance standard "create[d] the risk of increasing the number of individuals erroneously committed." *Id.* at 426-27.

Similarly, *Foucha* invalidated a statute as a violation of due process because it allowed for the detention of insanity acquittees who were no longer mentally ill and "place[d] the burden on the detainee to prove that he [was] not dangerous." 504 U.S. at 82. Notably, no Member of the Court suggested that a detainee could be deprived of *any* opportunity even to rebut a presumption of dangerousness. The issue that divided the Court was whether the Due Process Clause permitted placing the burden *on the detainee* to prove lack of dangerousness. *See, e.g., id.* at 114 n.10 (Thomas, J., dissenting) ("This would be a different case if Foucha had established that the statutory mechanisms for release were nothing more than window dressing, and that the State in fact confined insanity acquittees indefinitely without meaningful opportunity for review and release.").

The Court's immigration detention decisions further demonstrate that individualized determinations are essential for a detention statute to survive due process

scrutiny. For example, in *Carlson v. Landon*, the Court upheld the Attorney General's authority to detain alien Communists based on his discretionary decision, pursuant to an individualized determination, that release of a particular alien would pose a danger to the public. 342 U.S. 524, 538, 541-42 (1952). Although deportation could be premised on Communist Party membership alone, the Court drew a sharp distinction between the ground of deportation and the basis for detention, which required an additional determination of dangerousness based on "personal activity" or "active[ ] participat[ion]" in indoctrination. *Id.* at 541 (explaining that detention determination was grounded on "evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence") (emphasis added); *id.* at 530 (detention based on evidence that individuals were "actively participating in the Party's indoctrination of others to the prejudice of the public interest"). The Court stressed that only a small subset of deportable communist aliens were actually held without bail and noted the "allowance of bail in the large majority of cases." *Id.* at 542; *see id.* at 538 (stating that "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation").

Similarly, in *Reno v. Flores*, the availability of an individualized custody determination was key to the Court's finding that the provision was constitutional. 507 U.S. 292 (1993). The regulation there presumed that juvenile aliens could be released from INS custody only to adult relatives or legal guardians. *Id.* at 297. However, it specifically "maintain[ed] the discretion of local INS directors to release detained minors to other custodians in 'unusual and compelling circumstances.'" *Id.* at 310 (quoting 53 Fed. Reg. 17449 (1988)); *see also id.* at 313-14 (noting that among the determinations INS made in each individual case was whether "the alien's case [was] so

exceptional as to require consideration of release to someone else").[14] Significantly, the liberty interest in *Flores* was more qualified because juveniles do not have the same degree of autonomy as adults and thus "'freedom from physical restraint' . . . [was] not at issue . . . in the sense of a right to come and go at will." *Id.* at 302. In addition, the Court stressed that the juveniles were held in licensed juvenile care facilities, rather than in "shackles, chains, or barred cells." *Id.*

In *Zadvydas*, as well, the provision in question provided for individualized determinations of flight risk and danger. In questioning the statute's constitutional validity, the Court reiterated that it had "upheld preventive detention based on dangerousness only when . . . subject to strong procedural protections," including "proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards." 533 U.S. at 691 (citing *Kansas v. Hendricks*, 521 U.S. at 346, 347 (1997) and *Salerno*, 481 U.S. at 747, 750-52). The dissent also underscored the critical importance of individualized determinations of danger and flight risk. "Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns . . . on

[14] *See also* 53 Fed. Reg. 17449 (1988) (explaining that "[t]he intent of the regulation is to provide Service officials with the broadest possible discretion so that each case may be viewed based on a totality of the juvenile's circumstances"); *Flores v. Meese*, 942 F.2d 1352, 1377 (9th Cir. 1991) (en banc) (Wallace, J., dissenting) ("Even children whose release is not mandated under the regulation can, in the discretion of the INS, be released to other responsible adults."), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993). Notably, the INS's discretionary determination was further reviewable by an immigration judge, the BIA and the federal courts. *Flores*, 507 U.S. at 308. The court of appeals had found the INS procedures inadequate "because they [did] not provide for *automatic* review by an immigration judge" of the INS's custody decision. *Id.* (emphasis in original). The Court rejected that view because it held that "due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge." *Id.* at 309 (emphasis in original).

whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Id.* at 721 (Kennedy, J., dissenting).

As illustrated by these cases, Section 1226(c) goes far beyond any detention statute that the Court has ever considered or upheld. The statute provides for no individualized determination whatsoever as to whether the purposes of detention are served – much less a full-blown adversary hearing before a judicial officer; it allows for no consideration of an individual's background and characteristics or the nature and seriousness of an offense; and it prohibits release altogether, even for individuals whom the government itself concedes pose no danger or flight risk. Under the government's construction, detention is *required* merely because an immigrant has been convicted of one of the crimes designated under the statute. Section 1226(c)'s irrebuttable and inescapable mandate is unprecedented and constitutionally indefensible.[15]

2. The government nonetheless asks the Court to allow a categorical detention rule that has never been permitted in other settings because this case arises in the immigration context. Pet. Br. at 32-33; *id.* at 32 n.13 (arguing for "rational basis" review). However, as *Zadvydas* confirms and as already noted, the due process standard applicable to all other civil detention schemes applies equally to immigration detention. *See* 533 U.S. at 690. The Court has applied immigration and non-immigration

[15] The government cites *Kansas v. Hendricks* and *Jones v. United States* to suggest that a conviction, by itself, can be a proxy for danger. *See, e.g.*, Pet. Br. at 35 (citing *Hendricks*, 521 U.S. at 358); *id.* at 42 (citing *Jones*, 526 U.S. 227, 249 (1999)). However, in both cases the statutes allowed the individual to rebut any presumptions of dangerousness triggered by a prior conviction. That is precisely what Section 1226(c) lacks.

detention decisions interchangeably in assessing the constitutionality of detention schemes in both contexts. *See, e.g., Salerno*, 481 U.S. at 748 (citing *Carlson*, 342 U.S. at 537-42, to support pre-trial detention based on danger); *Zadvydas*, 533 U.S. at 690 (citing *Salerno*, 481 U.S. at 739; *Foucha*, 504 U.S. at 80; and *Hendricks*, 521 U.S. at 356).

The government's argument that Congress' plenary authority over immigration justifies a more deferential standard of review ignores the distinction between Congress' authority to set substantive immigration policies and the means for implementing those policies. Congress' plenary authority over immigration is relevant to Congress' ability to designate the offenses and convictions that may render an alien subject to deportation. However, as recognized most recently in *Zadvydas*, the *means* that Congress chooses to implement those policies are not subject to the same deference. *See Zadvydas*, 533 U.S. at 695 ("Congress must choose 'a constitutionally permissible means of implementing' its immigration power.") (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)); *see also Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (the judiciary must determine "whether the procedures meet the essential standard of fairness under the Due Process Clause"); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (while "[p]olicies pertaining to the entry of aliens and their right to remain here" are entitled to deference, "[i]n the enforcement of these policies ... the Government must respect the procedural safeguards of due process") (citations omitted).[16]

[16] Thus, the government's reliance on cases like *Fiallo v. Bell* and *Harisiades v. Shaughnessy* (see Pet. Br. at 23, 33) is plainly misplaced because those cases involve Congress' substantive policy judgments concerning which classes of aliens are admissible or deportable. *See Fiallo v. Bell*, 430 U.S. 787, 789-91 (1977) (legislation restricting admission of illegitimate alien children); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-90 (1952) (making Communist party membership grounds for deportation).

At issue here is *not* Congress' substantive immigration policy that immigrants convicted of certain crimes be deported, but whether Congress can enforce that policy by mandatorily detaining lawful permanent residents throughout their deportation proceedings. As *Zadvydas* makes clear, detention is a "means" by which substantive deportation policy is to be implemented. The government acknowledges that Section 1226(c) is one of the "particular removal *procedures*" that Congress adopted to effectuate its policy of removing immigrants with criminal convictions. Pet. Br. at 25 (emphasis added); *see also id.* at 8-9 (stating that Congress enacted mandatory detention to "implement its immigration policies"). Thus, consistent with *Zadvydas*, Section 1226(c)'s blanket requirement of detention during the pendency of deportation proceedings is not subject to the deference afforded substantive immigration policies. Rather it must comport with the due process standards that apply to any civil detention statute. *See* 533 U.S. at 690; *see generally* Brief Amici Curiae of Law Professors ("Law Professors Amici").

As noted above, the government's characterization of *Carlson* and *Flores* as supporting blanket detention during removal proceedings is flatly wrong. *See* Pet. Br. at 33. The government's brief in *Carlson* emphasized that a "mandatory" or "blanket" detention policy was *not* at issue. *See* Brief for the United States at 17, 19, *Carlson* (No. 35) (arguing that Attorney General did not use a "blanket approach" and did not interpret the detention statute as making it "mandatory" to deny bail to all alien Communists).[17] The question in *Carlson* was the same that the

[17] The government relies solely on the dissenting opinion in *Carlson* to support its characterization of the decision as upholding categorical detention of alien Communists. *See* Pet. Br. at 33 (citing *Carlson*, 342 U.S. at 559, 568 (Frankfurter, J., dissenting)). But the Court rejected the dissent's premise, finding instead that discretion was actually being exercised and that bail was allowed "in the large majority of cases." *Carlson*, 342 U.S. at 542. The Court had specifically asked the Department of Justice to provide a report on this issue,

(Continued on following page)

Court later confronted in *Salerno*, namely, whether danger could even be *considered* by the Attorney General in exercising his discretion to detain an alien during deportation proceedings. *See* 342 U.S. at 533-34. The Court held that danger could be considered, *not* that it could be presumed irrefutably. *See id.* at 538.

Flores also did not involve "a 'blanket' presumption" (Pet. Br. at 33) of detention. *See* n.14 and accompanying text, *supra*. It was the respondents in *Flores* who described the policy as a "'blanket' presumption," not the Court, which characterized the policy as one based on "reasonable presumptions and generic rules," neither of which were incompatible with "some level of *individualized determination*." 507 U.S. 292, 313 (1993) (citations omitted) (emphasis added).

Finally, the government's argument that the constitutional concerns identified in *Zadvydas* apply only to the specific circumstances of that case (*see* Pet. Br. at 32 n.13, 38-42) ignores the importance the Court placed on procedures for ensuring that the purposes of detention are served. In *Zadvydas*, the Court questioned the adequacy of the procedures that were available for deciding release of aliens with final orders of deportation. In contrast, Section 1226(c) provides *no* procedure at all whereby an individual can obtain release based on a lack of danger and flight risk.

As applied by the Attorney General, the statute at issue here is even more sweeping than the statute in *Zadvydas* because it affects lawful permanent residents like the respondent who retain their right to live and work in this country. In contrast, the aliens in *Zadvydas* had already been ordered deported and had lost their permanent resident status. *See Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting) ("[I]t must be made clear these

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further indicating its desire to ensure that the Justice Department was not implementing its policy in a categorical manner. *Id.*

aliens are in a position far different from aliens with a lawful right to remain here."). In light of the special constitutional protection afforded lawful permanent residents, *see Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), as well as the long-standing recognition that deportation proceedings must comply with procedural due process, *see Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903), the government's plenary power argument carries even less weight in this case than it did in *Zadvydas*. *See generally* Law Professors Amici.

B. Section 1226(c) Results In Prolonged Detention Of Lawful Permanent Residents Who Pose No Danger Or Flight Risk And Who Are Raising Bona Fide Challenges To Removal

Section 1226(c)'s prohibition of any individualized release determination is particularly harsh because it results in the prolonged detention of many lawful permanent residents like respondent who are convicted of relatively minor crimes, are raising bona fide challenges to removal, and may ultimately prevail in their proceedings.

The government seeks to defend Section 1226(c) by asserting that the detention it authorizes is "limited in duration" and applies only to a subset of immigrants who have been convicted of particularly serious crimes and whose removal is inevitable. Pet. Br. at 10-11, 21-22. These claims are belied by the statute itself, the Justice Department's own acknowledgment that the statute went "too far" in requiring detention of individuals convicted of relatively minor crimes,[18] and by the numerous examples

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[18] *See, e.g.*, Letter from Jon P. Jennings, Acting Ass't Attorney General, to Albert Gore, President of the Senate at 1 (June 10, 1999) (C.A. Appellee Br. Ex. E) (noting that "in some respects, [IIRIRA] went too far and hindered other enforcement efforts"); *see also* Letter from Robert Raben, Ass't Attorney General, to Congressman Barney Frank,

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of individuals who have suffered prolonged detention only to prevail in their challenges to removal. *See* CIEJ Amici (citing examples).

1. Detention under Section 1226(c) is indeterminate in length and, especially for many lawful permanent residents, prolonged. *See* n.6, *supra* (citing cases). The statute fixes no time limit on the detention it commands. The government seeks to avoid that fact by arguing that detention under 1226(c) has an "obvious termination point" – the conclusion of removal proceedings – and is therefore "limited in duration." Pet. Br. at 10, 39. But, as the Fourth Circuit emphasized, the existence of a "termination point" does not prevent detention from being either indefinite or prolonged, as there is "no clearly identifiable deadline by which that event must take place." *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002).

The government's statistics themselves show that, for individuals whose cases are appealed to the BIA, Section 1226(c) requires an "average" period of detention of six months. *See* Pet. Br. at 39-40 (reporting 47 day average for IJ hearings and four months for BIA appeals).[19] Moreover, the

77 Interpreter Releases (West) 217, 219 (2000) (acknowledging that Section 1226(c) applies to "individuals who committed relatively minor crimes and pose neither a danger to the community nor a flight risk").

[19] The government suggests that new procedures may shorten the time for BIA appeals. *See* Pet. Br. at 40 n.18. Any change, however, is speculative and likely transitory. For example, to the extent that these regulations result in more cases being remanded to the IJs, they are likely to *prolong* the administrative process. *See In re S-H-*, 23 I. & N. Dec. 462, 464-65 (BIA 2002) (explaining that scope of review under new regulations "restrict[s] [BIA] in its authority to engage in fact-finding on appeal, which might be necessary to bring a case to resolution"). In any event, even under the new regulations, the deadline for adjudication of "streamlined" appeals is still between 90 and 164 days, 8 C.F.R. 3.1(e), not including 21 days for submission of briefing (which can be extended), 30 days for filing the notice of appeal, and frequent delays of months for preparation of transcripts of the IJ proceedings (which are necessary before briefing can even commence).

government's focus on the "average" duration of proceedings, and, in particular, the "average" length of proceedings before an IJ, obscures the actual impact of the statute. *See* Pet. Br. at 10 (arguing that removal proceedings "generally are resolved by immigration judges within approximately one month"). These averages understate the length of detention for everyone who falls above the average. More significantly, they completely disregard the substantial additional time that the government's own statistics show is required for administrative appeals.[20]

The government's averages are also skewed downward by the substantial percentage of Section 1226(c) detainees who do not challenge their removal. According to these statistics, fully half of the individuals detained under Section 1226(c) fall into this category. *See* Pet. Br. at 39 (noting that "median" length of detention was 30 days). For these individuals, immigration proceedings are likely to conclude in a matter of days or at most weeks. Thus, the government's averages significantly understate the length of proceedings for lawful permanent residents who challenge their removal. *See* pp. 9-10, *supra*; *see also* Brief Amici Curiae of T. Alexander Aleinikoff *et al.* ("Former INS Officers Amici") (arguing that government's averages are "irrelevant" for this population).

As the Court has recognized, moreover, *pre-hearing* detention triggers special concerns because it impedes individuals' ability to present their cases. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951). Such obstacles are particularly formidable for aliens in removal proceedings because they

[20] Further, the government's statistics measure length of detention beginning from the formal commencement of proceedings. As respondent's case demonstrates, however, the formal commencement of proceedings may occur substantially *after* the INS takes an alien into custody. *See*, p. 9, *supra* (noting that INS did not commence proceedings against respondent until five weeks after his arrest and detention by INS). A calculation of detention time based on when proceedings commence therefore understates the actual time that aliens are detained.

are not entitled to appointed counsel, and are often jailed in isolated areas. *See* CIEJ Amici and Former INS Officers Amici (describing these and other obstacles affecting individuals subject to mandatory detention).

2. The government's claim that Section 1226(c) is limited to a subset of criminal aliens whose crimes "Congress deemed especially serious," Pet. Br. at 22, is also wrong. *See also id.* at 10, 34-35. Indeed, it is contradicted by the INS's own statements that Section 1226(c) applies to "virtually all aliens who are chargeable as criminals."[21] As previously noted, the statute is not limited to crimes that are particularly dangerous. Rather, it encompasses theft offenses, petty crimes, shoplifting and a wide array of minor and nonviolent crimes, including misdemeanors. *See* nn.3 & 4, *supra*.[22] Even convictions that do not result in any imprisonment on the criminal charge trigger mandatory detention.[23] *See, e.g.*, CIEJ Amici (setting forth

[21] *A Review of Dep't of Justice Immigration Detention Policies: Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Joseph Greene, Acting Deputy Exec. Assoc. Comm'r for Field Operations, and Edward McElroy, Dist. Dir., N.Y., U.S. Immigration and Naturalization Service), *available at* http://www.ins.gov/graphics/aboutins/congress/testimonies/2001/greene_121901.pdf. *See also* Immigration and Naturalization Service, U.S. Dep't of Justice, *Report on Detention and Release of Criminal and Other Aliens* 10 (1997) (estimating that 95% of criminal aliens in federal and state prisons and on parole would be subject to mandatory detention under 1226(c)).

[22] *See generally* 8 U.S.C. 1101(a)(43) (defining "aggravated felony" to include more than twenty broad categories of crimes, among these, receipt of stolen property, tax evasion, and offenses related to document fraud); *INS v. St. Cyr*, 533 U.S. 289, 296 nn.4 & 6 (noting that aggravated felony "has always been defined expansively, [and] was broadened substantially by IIRIRA" to include more "minor" crimes).

[23] *See* 8 U.S.C. 1101(a)(48)(A) (where ground of deportability requires prison sentence, this requirement deemed satisfied even when execution or imposition of sentence is entirely suspended); 8 U.S.C. 1227(a)(2)(A)(ii) (deportation based on two crimes involving moral turpitude "regardless of whether confined").

additional examples of individuals subjected to mandatory detention, notwithstanding the relatively minor nature of their offenses). Section 1226(c) thus stands in stark contrast to the statutes upheld in *Salerno* and *Hendricks*, which not only provided for individualized determinations of danger but were limited to classes of crimes far more indicative of danger than those that trigger Section 1226(c).[24]

Moreover, Section 1226(c) mandates the detention of aliens who are ultimately not removable, either because they remain eligible for relief from removal or because they are able to successfully challenge the INS's alleged grounds for deportation. For example, lawful permanent residents who are charged as deportable for having been convicted of "crimes involving moral turpitude" remain eligible for discretionary "cancellation of removal" and other forms of relief. *See* n.5, *supra*. If their criminal offenses pre-date IIRIRA, like respondent's, they may be eligible for Section 1182(c) waivers of deportation under *St. Cyr*.[25] Even if they are ineligible for such waivers, they may still qualify for withholding of removal under 8 U.S.C.

[24] *See Hendricks*, 521 U.S. at 368 (commitment limited to "small segment of particularly dangerous individuals" who had served time for or been charged with serious sex offenses); *Salerno*, 481 U.S. at 747 (pre-trial detention limited to "most serious of crimes," *i.e.*, "offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders") (citing 18 U.S.C. 3142(f) (1982 & Supp. III)).

[25] The government argues that *St. Cyr* relief will rarely be available because immigrants now detained under Section 1226(c) will necessarily have served a disqualifying five years in prison. *See* Pet. Br. at 28. That ignores the fact that the INS regularly initiates removal proceedings many years after the completion of a criminal sentence and applies Section 1226(c) to aliens released from criminal custody any time after October 1998. As for respondent, because he would have been eligible for Section 1182(c) relief when he waived his right to a jury trial in 1996, he has a strong argument under *St. Cyr* that elimination of the Section 1182(c) waiver imposes new legal consequence on his decision to forego a jury trial. *See* 533 U.S. 325-26.

1231(b)(3),[26] or deferral of removal under the Convention Against Torture.

In addition, many individuals have successfully asserted that their offenses do not constitute "aggravated felonies" or "crimes involving moral turpitude," thereby eliminating altogether the grounds for deportation.[27] For example, respondent's 1997 conviction for petty theft, though charged as an aggravated felony, does not

[26] The government argues that withholding of removal is rarely granted. *See* Pet. Br. at 30 (calculating only 7% grant rate for withholding applications during 2001 based on comparing number of grants against number of applications). But the government's figure is based on the erroneous assumption that every withholding application not granted was necessarily denied, whereas in fact, withholding applications are rarely adjudicated unless the accompanying asylum application is denied. *See In re Mogharrabi*, 19 I. & N. Dec. 439, 447 (BIA 1987). The grant rate for withholding applications is more accurately reflected by comparing the number of grants, 3,450, against the number of asylum denials, 14,956. *See* Office of Planning and Analysis, U.S. Dep't of Justice, *Statistical Yearbook 2001*, at O2 (2001). Based on this comparison, it appears that the grant rate for withholding applications during 2001 was closer to 20%.

[27] Whether a crime is properly classified as an "aggravated felony" has proven to be a highly contested issue. For example, the BIA recently overruled its own precedent that had found driving under the influence to constitute a "crime of violence" and hence an "aggravated felony," in light of the overwhelming circuit precedent to the contrary. *See In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002) (discussing circuit split). For other cases rejecting the INS's treatment of offenses as aggravated felonies, *see, e.g.*, *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001) (possession of counterfeit securities); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002) (embezzlement); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (vehicular homocide); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001) (drunk driving); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (vehicle burglary); *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (money laundering in amount of $1,310); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (BIA 2002) (possession of 0-2 ounces of marijuana); *In re Perez*, 22 I. & N. Dec. 1325 (BIA 2000) (vehicle burglary); *In re Alvarado-Alvino*, 22 I. & N. Dec. 718 (BIA 1999) (aiding and abetting an alien's entry at improper time and place); *In re Espinoza*, 22 I. & N. Dec. 889 (BIA 1999) (misprision of a felony).

constitute such an offense under *United States v. Corona-Sanchez*, 291 F.3d 1201, 1213 (9th Cir. 2002).

The government suggests that the harshness of detention under Section 1226(c) is ameliorated by the availability of a hearing where individuals can assert that they are not "subject to" the statute. *See* Pet. Br. at 26 (citing regulations and *In re Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999)). However, the fact that the Attorney General allows individuals to demonstrate they are *not* covered by the statute does nothing to diminish the constitutional infirmity for those who *are* covered. Indeed, the *Joseph* hearing does not address the constitutionally significant question of whether an individual presents a danger or flight risk. Nor does the hearing consider whether an alien is eligible for discretionary relief and thereby may ultimately prevail in his proceedings.[28] Moreover, even as to the one question that the *Joseph* hearing does address – whether an alien is subject to the statute – the burden that an alien must satisfy is so great that even aliens with bona fide challenges to the INS's charge of removability are unlikely to avoid mandatory detention while they pursue their claims.[29]

[28] The government argues that because some relief from removal is discretionary, any immigrant who is requesting such relief has "no claim to be free from mandatory detention on that basis." Pet. Br. at 27. But the government does not and cannot assert that an immigrant could be deported without a lawful adjudication of his claim for discretionary relief. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Thus, adjudications of discretionary waivers of removal are an integral part of the removal decision. *See Foti v. INS*, 375 U.S. 217, 223-24 (1963). The government's argument also overlooks that some forms of relief, such as withholding and CAT, are mandatory.

[29] Under *In re Joseph*, an alien can escape mandatory detention only if he can demonstrate that the INS is "substantially unlikely" to establish the ground for deportation that is charged. *See* 22 I. & N. Dec. 799. However, the kinds of legal claims that determine whether an alien is "subject to" Section 1226(c) frequently require reversal of the BIA by a federal court, or reversal by the BIA of its own precedent. *See* n.27, *supra*. Notably, *Joseph* imposes a substantially higher standard

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Section 1226(c) exacts its harshest toll on lawful permanent residents. By all recognized criteria, lawful permanent residents are the best candidates for release on bond due to their "family ties," "community ties," and "length of residence in the United States." *See In re Shaw*, 17 I. & N. Dec. 177, 178-79 (BIA 1979) (citing each of these factors as supporting release on bond for individuals in deportation proceedings). Because they have the strongest claims to relief from removal, they have an obvious incentive to appear for removal hearings. (This is especially the case because failure to appear will result in an "in absentia" removal order and a complete forfeiture of the right to reside in this country[30]). However, the fact that lawful permanent residents are more likely to have substantial claims for relief also results in their immigration proceedings being more protracted. Thus, Section 1226(c) often compels lawful permanent residents to choose between prolonged mandatory detention and abandoning bona fide claims to legal status.

The government ignores this issue entirely, wrongly asserting that the convictions that trigger Section 1226(c) "are sufficient to terminate . . . permanent resident status" and thus sufficient to require detention. Pet. Br. at 36. But, as already explained, many immigrants subject to Section 1226(c), including respondent, have claims that will *preserve* their permanent resident status. Moreover, the government's argument conflates Congress' power to establish substantive categories for deportation with

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than is imposed on many convicted criminal defendants seeking release pending appeal under the Bail Reform Act. *See* 18 U.S.C. 3143(b)(1)(B) (permitting release upon showing that appeal "is not for the purpose of delay and raises a substantial question of law or fact likely to result in" reversal or certain other favorable dispositions).

[30] *See* 8 C.F.R. 3.26(b) (requiring in absentia order of removal for failure to appear); 8 U.S.C. 1229a(b)(5)(A), (7) (describing other penalties that result from failure to appear, including 10-year bar on seeking discretionary relief).

Congress' authority to impose detention. *See* Point I.A.2., *supra*. As *Carlson* made clear, the mere fact that an alien is subject to a ground of deportation does not by itself constitute sufficient grounds to impose detention. The *Carlson* Court emphasized that the "purpose to injure could not be imputed generally to all aliens subject to deportation, so *discretion* was placed . . . in the Attorney General to detain aliens without bail." 342 U.S. at 538 (emphasis added).

Moreover, lawful permanent residents retain their legal status until they receive a final administrative order of removal – which comes only *after* the BIA renders its decision. 8 C.F.R. 1.1(p); *see also In re Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981). The Attorney General imposes mandatory detention *before* an order of removal issues. Ironically, *after* a final order issues, and an individual has *lost* his permanent resident status, the INA permits discretionary release of aliens who can demonstrate lack of danger and flight risk. *See* 8 U.S.C. 1231(a)(6) (authorizing discretionary release of criminal aliens 90 days after final order of removal).

C. The Government Has Not Shown That Individualized Bond Hearings Are Ineffective Or Burdensome

The government argues that Section 1226(c) is justified because Congress found that individualized bond determinations were ineffective at ensuring appearance at hearings and protecting against recidivism. Pet. Br. at 8. The government's voluminous references to legislative history and studies do not support its claims.

1. First, the government's own numbers show that the overwhelming majority of aliens – specifically 80% – appear for removal proceedings as ordered. *See* Pet. Br. at 8, 19 (citing 20% failure-to-appear rate). Further, far from providing "specific evidence about the consequences of allowing discretionary release", Pet. Br. at 19, the government's statistical reports and data all suffer from

the same defect: they do not address the efficacy of individualized release determinations. *See* Pet. Br. at 19 (citing, *inter alia*, 20%, 42%, and 88% failure-to-appear rates); *id.* at 17 (citing 77% and 45% rearrest rates). All of the government's statistics were collected during a period of time when INS detention and release decisions were driven by the lack of INS detention space. As previously noted, criminal aliens were frequently not taken into INS custody at all, either because they were not identified before the expiration of their criminal sentences or because the INS lacked detention capacity. Even when aliens were detained and screened, release frequently was triggered by a shortage of detention space, with bonds set at artificially low amounts when detention space was lacking. *See* nn.7 & 8 and accompanying text, *supra*; *see also* Former INS Officers Amici (attributing high failure-to-appear rate to lack of detention space rather than failure of discretionary release judgments).

The government's heavy reliance on the Office of Inspector General's absconder study ("OIG study"), Pet. Br. at 19-20, is particularly misplaced because, in addition to the flaw affecting all the studies, the OIG study concerns only individuals who were already the subject of a final order of removal. That population is distinct from individuals like respondent who are contesting their removal and may never be subject to final orders. *See generally* Brief Amicus Curiae of American Bar Ass'n ("ABA Amicus").

2. The government also fails to provide any evidence that Congress specifically considered and rejected the accuracy of individualized release determinations. Instead, the government devotes most of its discussion of legislative history to making two undisputed general points: first, that Congress wanted to ensure the timely and efficient removal of criminal aliens when it enacted IIRIRA, Pet. Br. at 11-18; and second, that immigration detention is a necessary component of the removal process, Pet. Br. at 18-21. However, immigration detention is only necessary to that process when an alien is likely to flee or pose a danger to the community while proceedings are

pending. Those interests simply do not justify detention without individualized bond hearings.

Although this case pertains to the elimination of bond hearings for lawful permanent residents, the government relies on legislative history of bills that did not even propose eliminating bond determinations for that population, as well as legislative history of provisions wholly unrelated to immigration detention. For example, the government repeatedly cites to House Report No. 469, including for the proposition that "the INS's failure to detain aliens during their deportation proceedings was '[a] chief reason why many deportable aliens are not removed.'" Pet. Br. at 18-19 (citing H.R. Rep. No. 469, *supra* n.8, at 123). However, House Report No. 469 refers to House Bill 2202 (the predecessor of IIRIRA), which would have allowed for discretionary release of lawfully admitted aliens, including aliens convicted of aggravated felonies, during the pendency of deportation proceedings.[31] Other

[31] *See also* Pet. Br. at 16 (quoting Testimony of Doris Meissner, Commissioner, INS, Before the Senate Judiciary Comm. Concerning S. 269, the Immigrant Control and Financial Responsibility Act of 1995 and the Immigration Enforcement Improvements Act of 1995, 1995 WL 110438 (Mar. 14, 1995)) (one of two bills being considered, S. 269, did not contain any provisions for detaining aliens pending proceedings; Meissner's testimony supported the other bill being considered, H.R. 1929, which maintained Attorney General's discretion to release lawful permanent residents pending proceedings, including individuals convicted of aggravated felonies); Pet. Br. at 34-35 (citing and quoting *Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 36, 44 (1989) ("1989 House Hearing")) (provision being considered expanded arrest authority of INS; bill contained no provision for detention pending proceedings); Pet. Br. at 17, 34 (citing *Hearing on H.R. 723, et al., Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 124, 125, 171, 173, 181 (1994)) (provisions being considered in the government's excerpts, H.R. 3302 and H. Con. Res. 47, raised penalties for travel document fraud, and resolved that federal government should enforce immigration law, respectively; neither provision discussed

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citations refer to aliens who have been convicted of a narrower category of crimes than are encompassed by Section 1226(c),[32] not aliens who are lawful permanent residents and who have been convicted of any of a broad category of crimes, many relatively minor.

Even as to passages that do refer to detention without bond determinations, *see, e.g.,* Pet. Br. at 21, the legislative history reveals that Congress did not specifically address the success or failure of individualized release determinations.[33] Rather, Congress' focus, as reflected in

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detention); Pet. Br. at 17-18, 34 (citing H.R. Rep. No. 22, 104th Cong., 2, 6-8, 12 (1995)) (amendments under consideration did not contain any detention provision); Pet. Br. at 35 (quoting 141 Cong. Rec. 4394-396 (1995)) (bill being considered did not include detention provision, and government quotes irrelevant statement of Sen. Kennedy about provision of bill that would "apply the RICO statute to alien smuggling crimes," 141 Cong. Rec. 4395); Pet. Br. at 18 (citing H.R. Rep. No. 645, 103d Cong., 4, 18, 21 (1994)) (report does not discuss detention pending immigration proceedings).

[32] The government cites to congressional statements about H.R. 3529 and S. 972, bills that required detention for individuals convicted of "murder, kidnapping, rape, or any attempt thereof, or any illicit trafficking in any controlled substance," and not the broad category of crimes encompassed by Section 1226(c). *See* Pet. Br. at 12-13 (quoting 133 Cong. Rec. 28,840, 28,841 (Statement of Rep. Smith)); Pet. Br. at 13 (quoting 133 Cong. Rec. 8771 (Statement of Sen. Chiles)).

[33] The government's citation to the 1993 Senate Hearing for the proposition that "the 1990 and 1991 amendments to the INA – which restored the possibility of bond for certain aggravated felons – had 'weakened substantially' the government's efforts to deport criminal aliens," Pet. Br. at 18, is misleading. The cited portion of the hearing merely noted that the 1991 technical amendments "weakened" the mandatory detention statute then in effect by allowing for discretionary release of some aliens who were *illegally* in the United States. *See* 1993 Senate Hearing, *supra* n.8, at 15, 26. No claim was made that the earlier 1990 amendment – which restored discretionary release for lawful permanent residents – had in any way "weakened" the government's enforcement efforts. The government's excerpted quote from H.R. Rep. 22 that "many [criminal aliens] who should be detained [during deportation proceedings] are released on bond," Pet. Br. at 18, is

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these and other sources cited by the government, was on failures of prior detention and removal schemes due to a myriad of administrative and managerial problems, including a failure to identify and apprehend criminal aliens before they were released from incarceration,[34] and a paucity of bed space that led to aliens being released irrespective of bond hearings.[35] *See* nn.7 & 8

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not to the contrary. Although respondent was unable to locate this quote within the cited Report, it is entirely consistent with the fact that many criminal aliens were released on bond due to lack of detention space. *See* n.8, *supra*. The government's citation to a recommendation by the Congressional Task Force on Immigration Reform concerning mandatory immigration detention, Pet. Br. at 21, is similarly unhelpful. The explanation of the recommendation – which is all of three sentences – does not specify what evidence formed the basis for the recommendation or even what the Task Force contemplated when it referred to "mandatory detention" of aliens "awaiting formal deportation." 1995 Task Force Report, *supra* n.8, at 49.

[34] The government cites Senate Report No. 48 and the 1993 Senate Hearing repeatedly, including for those sources' recommendations that all aggravated felons be detained pending proceedings. *See* Pet. Br. at 21. However, these sources focus on, among other things, deficiencies in the INS's record-keeping system and the INS's failure to identify criminal aliens while they are serving their criminal sentences. *See* S. Rep. No. 104-48, at 2, 4, 14-18, 22 (1995); 1993 Senate Hearing at 5, 7, 17-19. *See also* Pet. Br. at 20 (quoting 1989 House Hearing, *supra* n.31, at 75, for statement by GAO official that "alternatives to detaining prisoners don't often work;" however, the official subsequently stated that "we are not necessarily suggesting that the INS should take custody of each criminal alien immediately upon their conviction," instead recommending "a way of tracking" criminal aliens).

[35] *See, e.g.,* Pet. Br. at 19, 21, 25 (citing S. Rep. No. 48, 104th Cong. (1995) (discussing, at 23, problems associated with lack of bed space, but cited in government brief to illustrate failure of INS to deport under prior scheme, as well as for recommendation for detention of all aggravated felons pending proceedings)); Pet. Br. at 21, 37-38 (citing 1993 Senate Hearing for statement that "release on bond . . . is . . . a problem" and for recommendation of mandatory detention; however, release of criminal aliens was attributed to, among other things, lack of bed space, *e.g.*, at 8, 21, 55, not inadequacies in bond hearings); Pet. Br. at 18-19 (citing H.R. Rep. No. 469, *supra* n.8, at 123) (discussing

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and accompanying text, *supra*; *see also* Point I.C.1., *supra* (discussing flaws in government statistics).[36]

3. In contrast, there is ample evidence that individualized bond determinations based on assessments of danger and flight risk are entirely consistent with the INS's criminal alien removal efforts, particularly in light of the tripling of INS detention space that has occurred within the past decade. *See* n.9, *supra*. Such individualized release determinations are an integral and effective part

problems associated with lack of bed space, but cited by government for proposition that INS's failure to detain was a "chief reason" for INS failure to deport); Pet. Br. at 17 (citing 141 Cong. Rec. 15018, 15038 (1995) (acknowledging that "[a]s a result" of inadequate bed space, criminal aliens are released, but cited by government for recidivism figures)); Pet. Br. at 20-21 (citing *Criminal and Illegal Aliens, Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 1996 WL 502071 (Sept. 5, 1996) (Statement of David A. Martin, General Counsel of INS) (discussing increase in removals due to increase in INS bed space and funding – and later urging repeal of mandatory detention provisions of AEDPA, but cited by government in support of proposition that "[w]itnesses before Congress who were intimately familiar with the problem of absconding criminal aliens confirmed the importance of detaining these aliens pending deportation")); *see also* 1989 House Hearing, *supra* n.31 (discussing problems with low bonds resulting in release, as cited in Pet. Br. at 21; however, these low bonds may have been due to lack of bed space, *see* n.8, *supra*).

[36] The limited legislative consideration of Section 1226(c) stands in stark contrast to the detailed legislative history that supported detention schemes that the Court has upheld as constitutional. *See, e.g., United States v. Salerno*, 481 U.S. 739, 742 (1987) (citing S. Rep. No. 98-225, which noted at 8 that the statute was "carefully drafted" given that "a pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect").

of our criminal justice system.[37] There is no evidence that they cannot operate just as effectively in the immigration context. The INS routinely makes individualized bond determinations in removal proceedings for aliens not subject to Section 1226(c) and immigration judges regularly review these determinations in brief, informal bond hearings. 8 C.F.R. 3.19. Requiring similar bond determinations for criminal aliens as well would place no additional administrative burden on the INS. Immigrants detained under Section 1226(c) can already appear before an IJ to seek review of the INS's determination that they are properly subject to the statute. Pet. Br. at 26. Incorporating danger and flight risk into this determination would not add any measurable cost or impose any delay.

The success of the two-year Transition Period Custody Rules and of the Vera Institute pilot project confirms that individualized release determinations can operate just as effectively for the population of immigrants with criminal convictions. *See* Vera Study, *supra* n.10, at 36 (showing 92-94% appearance rate for lawful permanent residents with criminal convictions); *see generally* ABA Amicus. Notably, the INA provides for discretionary release determinations for categories of aliens who pose a potentially far greater flight risk or danger. *See* Pet. App. 22a-23a (noting that 8 U.S.C. 1231(a) affords the same group of criminal aliens who are subject to mandatory detention during administrative removal proceedings, discretionary release from detention 90 days after they have received a final order of removal); *see also* 8 U.S.C. 506(a)(2) (authorizing discretionary release of lawful permanent residents charged in

[37] *See* Pretrial Services Act of 1982, Pub. L. No. 97-267, Section 2, 96 Stat. 1136 (codified at 18 U.S.C. 3152) (establishing pretrial services in each federal judicial district). *See also* Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* 322, 325 (1998) (reporting 1,130 rearrests and 838 failures to appear out of 35,211 released).

Special Terrorist Removal Proceedings). Certainly, a statutory scheme that mandates detention of individuals convicted of minor crimes, while authorizing release of alien terrorists, is irrational and arbitrary. Thus, under any formulation, Section 1226(c) violates due process.[38]

II. SECTION 1226(c) SHOULD BE CONSTRUED NOT TO APPLY TO RESPONDENT

While the mandatory detention dictate of Section 1226(c) suffers from the constitutional infirmity demonstrated above, the Court may avoid deciding the constitutional issue in this case. Section 1226(c) applies only to an alien who "is deportable." Consistent with congressional intent and the doctrine of constitutional avoidance, the Court should construe that provision to require a final administrative order of removal before an alien is subject to mandatory detention. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[39] Because no such order has issued against respondent, he is not subject to mandatory detention under the statute.[40]

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[38] Section 1226(c) also violates procedural due process because its prohibition of any individualized determination of danger and flight risk creates an unreasonably high risk that lawful permanent residents will be erroneously deprived of their liberty. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (setting forth procedural due process test); *see also Plasencia*, 459 U.S. at 34 (applying *Mathews* test to immigration proceedings).

[39] Such a construction would also avoid a conflict with international law prohibitions against arbitrary detention. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see generally* Brief Amici Curiae of International Human Rights Organizations.

[40] For the reasons set forth in Point I., *supra*, Section 1226(c) would also raise profound constitutional issues as applied to aliens with final removal orders, but the Court need not address these issues here

(Continued on following page)

A. In IIRIRA, Congress Chose To Require Mandatory Detention Only If An Alien "Is Deportable"

In enacting the mandatory detention provision of IIRIRA, Congress chose a new standard for detention. Under its predecessor statutes, detention was triggered if an alien was "convicted" of certain offenses. In IIRIRA – for the first time – Congress changed the language, applying the detention provision not if an alien is "convicted," but if an alien "is deportable."

1. *Pre-IIRIRA Detention Statutes.* From 1988 through 1996, Congress enacted various detention provisions that applied to aliens with criminal convictions. In each instance, the detention provision applied to aliens who were "convicted" of designated offenses.

Congress' first mandatory detention statute, enacted in 1988, required that the Attorney General detain any alien "convicted" of designated offenses. 8 U.S.C. 1252(a)(2) (1989) (added by Anti-Drug Abuse Act of 1988, Section 7343(a), Pub. L. 100-690, 102 Stat. 4181). The provision did not provide any opportunity for release. The constitutionality of the 1988 mandatory detention provision was challenged in a number of courts, and the majority of courts that considered the issue struck the provision down as unconstitutional.[41]

In 1990, Congress amended this detention provision to restore the possibility of release for lawful permanent

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because respondent is not subject to a final order. *See, e.g., Jones v. United States*, 529 U.S. 848, 860 (2000) (Thomas, J., concurring).

[41] *See, e.g., Fernandez-Santander v. Thornburgh*, 751 F. Supp. 1007 (D. Me. 1990), *vacated and remanded without opinion*, 930 F.2d 906 (1st Cir. 1991); *Kellman v. District Director, INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); *Probert v. INS*, 750 F. Supp. 252 (E.D. Mich. 1990), *aff'd*, 954 F.2d 1253 (6th Cir. 1992); *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990); *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990).

residents. 8 U.S.C. 1252(a)(2) (1991) (as amended by Immigration Act of 1990, Section 504, Pub. L. No. 101-649, 104 Stat. 4978). Like its predecessor, the provision applied to those aliens "convicted" of designated offenses, but it permitted the release of a lawful permanent resident if the alien was not a danger or flight risk. In 1991, Congress again amended the detention provision, further expanding the class of aliens eligible for release: after the 1991 amendments, any lawfully admitted alien who had been "convicted" of designated offenses could be released if the alien was not a danger or flight risk. 8 U.S.C. 1252(a)(2) (1992) (as amended by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Section 306(a)(4), Pub. L. No. 102-232, 105 Stat. 1733). Then, in 1996, Congress passed Section 440(c) of AEDPA, which eliminated the release provision and, therefore, required mandatory detention. Like all of the predecessor statutes, detention under AEDPA was triggered if an alien was "convicted" of designated offenses.

2. *Legislative Evolution of IIRIRA.* In enacting IIRIRA, the House and the Senate considered competing proposals with significantly different detention and release provisions. The legislative history indicates that Congress rejected triggering mandatory detention on whether an alien is "convicted," but instead chose the term "is deportable" as part of a legislative compromise.

The House bill did not provide for mandatory detention. Under the House approach, detention was required for those aliens "convicted" of designated offenses. Significantly, however, the House bill provided for release of any lawfully admitted alien who did "not pose a danger to the safety of other persons or of property and [was] likely to appear for any scheduled proceeding." H.R. 2202, 104th Cong., Section 303 (passed by House and placed on calendar in Senate).[42] By contrast, under the Senate bill,

[42] On June 22, 1995, the House introduced H.R. 1915. Under H.R. 1915, the Attorney General was to take into custody any alien

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detention would have been mandatory (without the possibility of release for those who were not a danger or flight risk) for aliens "convicted" of certain crimes. S. 1664, 104th Cong., Section 164(b), (e) (reported in Senate) (requiring detention of "specially deportable criminal alien[s]," defined as those "convicted" of designated offenses).[43]

The bill that emerged from Conference represented a legislative compromise. On the one hand, the bill provided for detention without the opportunity for release for those aliens who were not a danger or flight risk. H.R. Conf. Rep. No. 104-828, Section 303, at 39 (1996). But – for the first time – the detention provision was not triggered if an alien was "convicted" of certain crimes, but, rather, if he "is deportable." *Id.*[44]

B. Under The Statute, An Alien "Is Deportable" Only After There Is A Final Order Of Deportation

Consistent with congressional intent as reflected by this congressional compromise, this Court should construe

"convicted" of designated offenses. H.R. 1915, 104th Cong., Section 303 (introduced in House). This bill, however, provided for release of a lawfully admitted alien as long as he could demonstrate that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id.* On August 4, 1995, the House reintroduced H.R. 1915 as H.R. 2202, with the identical detention provision. H.R. 2202, 104th Cong., Section 303 (introduced in House). On March 4, 1996, the House Judiciary Committee reported H.R. 2202 favorably out of committee, H.R. Rep. No. 104-469, pt. I, and on March 21, 1996, the House passed H.R. 2202.

[43] On April 10, 1996, S. 1664 was reported out of committee, S. Rep. No. 104-249, and, on May 2, 1996, the Senate passed the language contained in S. 1664.

[44] In light of this legislative evolution, the government's reliance on certain legislative history sources is baffling. The government relies on the House Report on H.R. 2202 (H.R. Rep. No. 104-469) for support of mandatory detention, Pet. Br. at 16, 19, 34, 35, but, as noted, H.R. 2202 did not require mandatory detention.

the term "is deportable" to require a final administrative order before an alien is subject to mandatory detention. Although the term "is deportable" is used in different ways within the INA, one meaning under the statute is that an alien "is deportable" only after the issuance of a final removal order. For example, in 1996, Congress defined an order of deportation as a decision of an officer to whom the Attorney General "has delegated the responsibility for determining whether an alien is deportable;" this order becomes final when the BIA makes "a determination" that the order should be affirmed (or if the time for review elapses). 8 U.S.C. 1101(a)(47) (added by AEDPA Section 440(b)). Only then has the agency decided that an alien is deportable within the meaning of the statute. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (final agency action is the "consummation of the agency's decisionmaking process" such that "legal consequences will flow" from the action) (citations omitted).[45] This is particularly true for lawful permanent residents such as respondent, who retain their legal status until there is a final administrative order of deportation. 8 C.F.R. 1.1(p); *see also In re Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).

[45] The INA uses "is deportable" (as well as the related term "is removable," *see* 8 U.S.C. 1229a(e)(2)(B)), in other ways as well. For example, sometimes the term appears to refer to an IJ's determination whether an alien falls within the class of aliens who are subject to deportation, *e.g.*, 8 U.S.C. 1229b, while other times it appears to refer to the IJ's order of deportation, *e.g.*, 8 U.S.C. 1229a(c)(1)(A); 1229a(c)(5)(A). Additionally, the statute uses the term to define the "classes of . . . aliens" subject to deportation if the facts are proven. 8 U.S.C. 1227(a). These various meanings of "is deportable" in the statute demonstrate the ambiguity of the term, and underscore that there are various interpretations of the term that are "fairly possible" under the statute. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' *see Crowell v. Benson*, 285 U.S. 22, 62 (1932), we are obligated to construe the statute to avoid such problems.").

Under this construction, Section 1226 covers a gap that would otherwise exist in the statutory scheme created by 8 U.S.C. 1231 (the provision that this Court interpreted in *Zadvydas*). While Section 1231 generally governs post-final order detention, it does not, by its plain language, cover those aliens who are seeking judicial review and have received judicial stays pending review. According to the language of Section 1231, that provision applies to detention during the "removal period," but the removal period does not begin until "the *latest of the following*: (i) [t]he date the order of removal becomes administratively final; [or] (ii) [i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order." 8 U.S.C. 1231 (emphasis added). Thus, under the plain terms of Section 1231, if a court orders a stay of removal, Section 1231 does not authorize detention.

Section 1226(a) and (c) cover this gap in the statutory scheme, providing the authority to detain aliens who seek judicial review and are granted judicial stays pending review. Aliens are subject to Section 1226 until Section 1231 takes effect – which, for aliens who have judicial stays, is not until the date of the court's order. Under Section 1226(a), the INS is authorized (but not required) to detain an alien "pending a decision" (a term that, under its plain meaning, encompasses a BIA decision or a federal court decision). If an alien has a judicial stay and is described in Section 1226(c), that alien is subject to mandatory detention. 8 U.S.C. 1226(a) (subsection (a) applies "[e]xcept as provided in subsection (c)"). On the other hand, if the alien has a judicial stay but is *not* within the class of aliens described in Section 1226(c), that alien remains subject to discretionary detention under Section 1226(a). Indeed, unless Section 1226(a) continues to cover this group, there would be no statutory authority to detain this category of aliens (*i.e.*, aliens with stays pending judicial review who are not described in Section 1226(c)),

an anomaly that would appear to be inconsistent with Congress' intent.[46]

In addition to the statutory language, there are a number of reasons to conclude that Congress, in passing mandatory detention, was targeting aliens with final orders who were seeking judicial review. First, the legislative record reveals that Congress believed that the risk of flight increases significantly once a final order of deportation has been entered. According to one hearing (also cited by the government), while only 20% of aliens failed to appear during administrative proceedings, nearly 90% failed to appear after a final order of deportation. 1993 Senate Hearing, *supra*, n.8, at 21; *see also* Pet. Br. at 19-20. Congress thus imposed mandatory detention on those aliens it believed were most likely to flee. *But see* Point I.C.1., *supra* (explaining flaws in these statistics).

Second, Congress made other changes in IIRIRA that are consistent with the choice to subject criminal aliens to mandatory detention pending judicial review. Importantly, Congress intended that many criminal aliens would have final orders of deportation by the time they finish serving their criminal sentences and, therefore, would be immediately subject to Section 1226(c). In IIRIRA, Congress strengthened the Institutional Hearing Program, under which removal proceedings were to take place while an alien was still in criminal custody. 8 U.S.C. 1228. The statute explicitly states that, for aliens convicted of aggravated felonies, the Attorney General shall, to the extent possible, "complete[ ] ... removal proceedings, and any administrative appeals thereof ... before the alien's release from incarceration." 8 U.S.C. 1228(a)(3)(A).

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[46] The government avoids this anomaly by arguing that Section 1231 applies to all aliens with final orders, including those who have judicial stays pending review. As noted, this interpretation is not supported by the plain language of the statute.

Congress also made a significant change to the INA by amending the law to permit an alien to challenge a final order from outside the United States. *See* 8 U.S.C. 1252 (replacing 8 U.S.C. 1105a); 8 U.S.C. 1105a(c) (1994) (under previous statute, "[a]n order of deportation ... shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order"). Thus, Congress intended that, after IIRIRA, an alien who challenges his final order would be able to leave the country and continue his judicial challenge without prejudicing his legal rights. Under this scenario, mandatory detention would not force individuals to choose between prolonged detention and forfeiting their legal claims.

Third, when Congress designed the special alien-terrorist removal procedures in AEDPA, it mandated detention only for those aliens who had been ordered removed and whose orders were pending a judicial appeal. *See* 8 U.S.C. 1531-1537. Significantly, the alien-terrorist provisions *permit* release of a lawful permanent resident who is accused of being a terrorist during the course of removal proceedings, so long as he can demonstrate that he is not a danger, a flight risk, or a threat to national security. 8 U.S.C. 1536(a)(2) ("An alien lawfully admitted for permanent residence shall be entitled to a release hearing before the judge assigned to hear the removal hearing."). For these aliens, mandatory detention is triggered only after a decision has been made (by an Article III judge): "If the alien was released pending the removal hearing, the judge shall order the Attorney General to take the alien into custody." 8 U.S.C. 1534(i). Accordingly, for these alien terrorists, detention is mandatory only pending an appeal: "If the judge decides that an alien shall be removed, the alien shall be detained pending the outcome of any appeal." 8 U.S.C. 1537(b)(1). It would be bizarre to conclude that Congress provided release provisions that were more permissive for terrorists than for those aliens charged with deportability for having committed ordinary crimes.

Finally, by choosing to apply mandatory detention only to those who have received final administrative orders of removal, Congress employed a distinction that already had legal and administrative significance. *See Bennett*, 520 U.S. at 177-78; *see also* 8 C.F.R. 1.1(p) (lawful permanent resident status terminates with issuance of a final administrative order); 8 C.F.R. 3.6(a) (automatic stay of deportation pending issuance of final administrative order).

The government's reading of Section 1226(c) fails to give effect to Congress' decision to replace the term "convicted" (used in previous statutes) with IIRIRA's new term "is deportable."[47] In the government's view, an alien is subject to mandatory detention once the government charges the alien with deportability for having been convicted of a crime, unless the alien can prove that the government is "substantially unlikely" to establish the charge. *See In re Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999). The government's position is inconsistent with the statute, which states that the charging document merely sets out allegations, 8 U.S.C. 1229(a)(1)(D) (notice to appear sets out the "*charges* against the alien and the statutory provision *alleged* to have been violated") (emphasis added), and *commences* the proceeding for determining whether an alien is deportable, *see* 8 U.S.C. 1229a.

[47] The Ninth Circuit's interpretation similarly fails to give content to Congress' use of the term "is deportable." While the Ninth Circuit recognized that "is deportable" could have different meanings, the court rejected respondent's interpretation, concluding that it was incompatible with Section 1226(c)'s requirement that aliens be taken into custody "when released" from criminal incarceration. Pet. App. at 28a-29a. This reading, however, ignores Congress' emphasis on prison deportation proceedings and its expectation that, in many cases, criminal aliens would have a final order of deportation before they left criminal custody, 8 U.S.C. 1228, and, therefore, would be immediately subject to Section 1226(c) upon release. In addition, the BIA has interpreted the "when released" language to apply to aliens who have not been taken into custody immediately upon release from criminal incarceration. *In re Rojas*, 23 I. & N. Dec. 117 (BIA 2001).

Moreover, the additional review supposedly offered by *In re Joseph* does not purport to give any content to the term "is deportable" (as opposed to "convicted"), and offers little more than the requirement that the government must have a good faith basis to file a charging document. It would hopefully be the rare case in which the government brings a charge so baseless that the alien would prevail under this standard.[48]

[48] The government's argument also renders meaningless provisions of the Transition Period Custody Rules ("TPCR"), which were designed to cover the transition from AEDPA to IIRIRA. The TPCR appears to be contradictory on its face: an alien "convicted" of an aggravated felony was subject to detention and could not be released, IIRIRA Section 303(b)(3)(A)(i), (B), but an alien who "is deportable" by reason of having committed an aggravated felony could be released, IIRIRA Section 303(b)(3)(A)(iii), (B). Under the government's reading – which attributes no difference to Congress' use of "convicted" and "is deportable" – there is no way to reconcile these provisions, and release would be both permitted and prohibited for an alien convicted of an aggravated felony. Indeed, the BIA, faced with the apparent incongruity, effectively read section (i) out of the statute. *In re Noble*, 21 I. & N. Dec. 672, 684 (BIA 1997) ("The parties have not offered, nor have we identified, a sensible way of construing the statute so as to give effect to both" (A)(i) and (A)(iii).).

The TPCR should be understood as a transitional provision between the harsher detention statute of AEDPA and the more moderate provision of IIRIRA. At the time the TPCR was enacted, aliens were already in custody under AEDPA Section 440(c), which required mandatory detention for aliens "convicted" of certain crimes. Subsection (i) of the TPCR – which, like AEDPA, applied to aliens who had been "convicted" of crimes – targeted a subset of the aliens already in custody under AEDPA Section 440(c) (*i.e.*, aggravated felons), and prohibited their release. IIRIRA Section 303(b)(3)(B). Subsection (iii) applied to those aliens who were to be detained in the future (including aggravated felons), as well as to the non-aggravated felons in custody under AEDPA. This reading makes sense of the fact that Congress listed aggravated felons in both (i) (and prohibited release) and (iii) (and provided for release), and recognizes that the TPCR was designed, as its name suggests, as a "transition[al]" provision between AEDPA Section 440(c) and the new standard articulated in IIRIRA.

The crux of the government's argument is that, once the INS charges an alien with deportability, it is virtually inevitable that the alien will be deported. *See* Pet. Br. at 41 (asserting that, once the INS charges an alien, it is "very likely" that a final order will be entered, and analogizing pre-final order detention to the post-final order detention considered in *Zadvydas*). But that is not so: some aliens will be eligible for relief, while others, like respondent, may not even be within the class of aliens subject to deportation. *See* Point I.B.2., *supra*. Rather than requiring mandatory detention based on the INS's mere say-so, Congress required a final administrative order of removal before an alien could be subject to Section 1226(c).

CONCLUSION

For the reasons and upon the authorities cited above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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